



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: FEBRUARY 10, 2023

IN THE MATTER OF:

Appeal Board No. 626564

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective December 31, 2021, on the basis that the claimant voluntarily separated from employment without good cause. The claimant requested a hearing.

Upon due notice to all parties, a hearing was held at which all parties were accorded a full opportunity to be heard. The claimant was present but was not prepared to proceed and, therefore, is deemed to have failed to appear at the hearing. By default decision filed August 15, 2022 (A.L.J. Case No. 122-05431), the Administrative Law Judge sustained the initial determination.

The claimant applied to reopen the decision of the Administrative Law Judge filed August 15, 2022. Upon due notice to all parties, telephone conference hearings were held at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed October 28, 2022 (A.L.J. Case No. ), the Administrative Law Judge did not make findings of fact or render a conclusion on the issue of the claimant's application to reopen, and sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statements submitted on behalf of the claimant and the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed as a crew member and maintenance worker by the employer fast food restaurant for about one and a half years. The employer had an "Anti-Harassment and Sexual Harassment" policy, which prohibits disrespectful and inappropriate behavior, and harassment of any kind. The policy states further, in pertinent part, that when a manager or supervisor becomes aware of any violations of the policy, they are to take immediate and appropriate corrective action, and immediately notify the owner/operator of any policy violations.

About three or four months prior to December 30, 2021, another maintenance worker (SS) began confronting the claimant with threats because he believed the claimant was involved in a romantic relationship with SS's girlfriend, a manager at the restaurant; the claimant and SS's girlfriend had known each other before she and SS had started dating. The claimant had informed managers, including the General Manager, SDM, about SS's harassment, hostility, and threats, on multiple occasions, and was told the employer would look into it. SS's threatening and hostile behavior continued. The claimant did not complain to anyone above the managers because he thought that it was the managers' responsibility to take care of it, and take the claimant's complaint "up the ladder" if necessary.

When the claimant was clocking in to work before 2:00 P.M. on December 30, 2021, SS approached him and told the claimant he was going to meet him by the dumpster when he reported to work the following day and physically fight with him. The claimant and SS exchanged loud words, overheard by at least one coworker, and SS left, indicating that he would be there the next day to harm the claimant. When the claimant went home that night, he began to get Facebook messages from SS repeating his threat that he was going to meet the claimant when he came into work the next day, and harm him. After getting some of these texts from SS, the claimant contacted SDM. In addition to questioning SDM about a paycheck, the claimant reported to SDM what SS had said to the claimant when he was clocking in that day: that he had threatened to meet the claimant as he was arriving for work the following day and beat him. After this conversation with SDM, the claimant continued to get threatening messages from SS until the claimant threatened to call the police. The claimant was so frightened by what SS was threatening to do to him the next day, and was so concerned about his safety, that he texted SDM at 11:36 P.M., and said that he was sorry but he was quitting and would not be in the next day. The claimant did not thereafter return to work.

A telephone hearing was scheduled for August 15, 2022. The claimant received the hearing notice, and was present on the phone call, but he was not prepared to proceed because he did not have the file documents with him, and did not have the documents the employer sent prior to the hearing. It was determined that the claimant needed to have the documents to go forward with the hearing, and a default in proceeding decision was issued. The claimant applied to reopen the default on or about September 1, 2022.

OPINION: The evidence establishes that the claimant was not prepared to proceed at the hearing held on August 15, 2022 because he did not have the file documents that had been sent to him, and did not have documents the employer had sent prior to the hearing. Since it was determined that the claimant needed these documents to fully participate in the hearing, there was a compelling reason for his inability to participate in the August 15, 2022 hearing. Since the claimant requested a reopening within a reasonable time of the issuance of the default, his application to reopen the default decision in 122-05431, is granted.

The credible evidence establishes that the claimant's employment ended on December 30, 2021 when he resigned. The evidence also establishes that the claimant voluntarily left his employment because a coworker, who had a history of threats and hostility towards the claimant, had threatened to physically harm the claimant the next day when he came to work. It is significant that the claimant is the only firsthand witness to testify about the continuing, and escalating, threats from SS; his testimony that SS had threatened to beat him, and that he feared for his physical safety, is not disputed by the employer.

The employer does dispute, however, that the claimant had told managers about SS's threatening behavior, both prior to December 30, 2021, and on that night. We are more convinced by the claimant's consistent, credible testimony that he had brought the matter to the employer's attention on multiple occasions, than by the employer's contention to the contrary. In assessing the relative credibility of the parties, we find it significant that the claimant's manager, SDM, testified that the claimant did not mention his interaction with SS when they spoke by phone on December 30, 2021. However, this testimony is inconsistent with his text messages the following morning. Specifically, when another manager asked SDM on the morning of December 31, 2021 whether he spoke with the claimant "last night," SDM responded "yes, apparently about an incident between him and [SS] that happened a little before two at work." This

inconsistency on such an important fact, renders the manager's testimony unpersuasive.

Further, we are not persuaded that the claimant quit before the employer had the opportunity to investigate and address his concerns. The claimant's credible and consistent testimony establishes that he had previously spoken to SDM about SS's continuing threats and hostility, but no action had been taken by the employer to stop it. In light of the employer's policy placing responsibility on a manager or supervisor who learns of a harassment complaint, it was reasonable for the claimant to expect the manager to take steps to bring his complaint "up the ladder." Further, it was not unreasonable for him to conclude that any further complaints would not be addressed by the employer appropriately, and that it would be futile to wait for the employer to take appropriate action. See, Appeal Board No. 559567, in which the Board found that the claimant's voluntary separation, "in lieu of enduring continued harassment without recourse" was with good cause, and not disqualifying.

For these reasons, we find that this claimant had good cause for his voluntary separation from employment for unemployment insurance purposes. Accordingly, we conclude that the claimant was separated from employment under nondisqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is affirmed in part and reversed in part.

The claimant's application to reopen 122-05431, is granted.

The initial determination, disqualifying the claimant from receiving benefits, effective December 31, 2021, on the basis that the claimant voluntarily separated from employment without good cause, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER